

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:13-CR-18 JCM (GWF)

Plaintiff(s),

ORDER

V.

LEON BENZER, et al.,

Defendant(s).

Presently before the court is the government's motion *in limine* to admit evidence of other acts by defendant Leon Benzer (hereinafter "defendant") pursuant to Federal Rule of Evidence 404(b). (Doc. # 335). Defendant did not file a response, and the deadline to respond has now passed.

I. Background

The facts of the instant case are familiar to the court. Defendant Benzer is accused of directing and facilitating an elaborate scheme to take over homeowners association (“HOA”) boards for financial gain. (Doc. # 335). He is charged with conspiracy, mail fraud, and wire fraud. (Doc. # 1).

In the instant motion, the government seeks a ruling on the admissibility of other acts evidence. Defendant is charged separately from this case for failing to disclose over \$8 million earned from the alleged conspiracy to the Internal Revenue Service (“IRS”). The government argues that this evidence is admissible against defendant to show his knowledge that the alleged scheme was unlawful.

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1 **II. Legal Standard**

2 *A. Motions in limine*

3 “The court must decide any preliminary question about whether . . . evidence is
 4 admissible.” Fed. R. Evid. 104. Motions *in limine* are procedural mechanisms by which the
 5 court can make evidentiary rulings in advance of trial, often to preclude the use of unfairly
 6 prejudicial evidence. *United States v. Heller*, 551 F.3d 1108, 1111-12 (9th Cir. 2009); *Brodit v.*
 7 *Cambra*, 350 F.3d 985, 1004-05 (9th Cir. 2003).

8 “Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the
 9 practice has developed pursuant to the district court’s inherent authority to manage the course of
 10 trials.” *Luce v. United States*, 469 U.S. 38, 41 n.4 (1980). Motions *in limine* may be used to
 11 exclude or admit evidence in advance of trial. *See* Fed. R. Evid. 103; *United States v. Williams*,
 12 939 F.2d 721, 723 (9th Cir. 1991) (affirming district court’s ruling *in limine* that prosecution
 13 could admit impeachment evidence under federal rule of evidence 609).

14 Judges have broad discretion when ruling on motions *in limine*. *See Jenkins v. Chrysler*
 15 *Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002); *see also Trevino v. Gates*, 99 F.3d 911, 922
 16 (9th Cir. 1999) (“The district court has considerable latitude in performing a Rule 403 balancing
 17 test and we will uphold its decision absent clear abuse of discretion.”).

18 “[I]n limine rulings are not binding on the trial judge [who] may always change his mind
 19 during the course of a trial.” *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000); *accord Luce*,
 20 469 U.S. at 41 (noting that *in limine* rulings are always subject to change, especially if the
 21 evidence unfolds in an unanticipated manner).

22 *B. Intrinsic evidence*

23 Evidence that is inextricably intertwined with the instant crime charged is considered to
 24 be intrinsic. *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012 (9th Cir. 1995). Where
 25 evidence meets this test, it is exempt from the prohibition on character evidence in federal rule of
 26 evidence 404(b). *Id.*; *see also* Fed. R. Evid. 404(b) (stating that evidence of other acts is not
 27 admissible to prove that defendant acted in accordance with a particular trait).

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1 The Ninth Circuit has permitted evidence as intrinsic in two instances. First, evidence
 2 may be inextricably intertwined with the instant offense where the other act “constitute[d] a part
 3 of the transaction that serves as the basis for the criminal charge.” *Id.* “The policies underlying
 4 rule 404(b) are inapplicable when offenses committed as part of a ‘single criminal episode’
 5 become other acts simply because the defendant is ‘indicted for less than all of his actions.’”
 6 *United States v. Williams*, 989 F.2d 1061, 1070 (9th Cir. 1993) (quoting *United States v.*
 7 *Soliman*, 813 F.2d 277, 279 (9th Cir. 1987)).

8 Second, evidence may be admitted as intrinsic where “it [is] necessary to do so in order
 9 to permit the prosecutor to offer a coherent and comprehensible story regarding the commission
 10 of the crime” *Vizcarra-Martinez*, 66 F.3d at 1012-13.

11 C. *Other acts evidence*

12 Federal Rule of Evidence 404(b)(1) states that, “[e]vidence of a crime, wrong, or other
 13 act is not admissible to prove a person’s character in order to show that on a particular occasion
 14 the person acted in accordance with the character.” Fed. R. Evid. 404(b)(1). However, rule
 15 404(b)(2) allows introduction of such evidence “for another purpose, such as proving . . .
 16 knowledge” Fed. R. Evid. 404(b)(2).

17 In the Ninth Circuit, evidence is admissible under rule 404(b) if “(1) the evidence tends to
 18 prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to
 19 support a finding that defendant committed the other act; and (4) (in certain cases) the act is
 20 similar to the offense charged.” *United States v. Cherer*, 513 F.3d 1150, 1157 (9th Cir. 2008).
 21 The fourth prong is a prerequisite when the evidence is introduced to prove intent. *See United*
 22 *States v. Luna*, 21 F.3d 874, 878 n.1 (9th Cir. 1994).

23 Evidence passing the rule 404(b) test is admissible unless its probative value is
 24 substantially outweighed by the danger of unfair prejudice. *See* Fed. R. Evid. 403; *United States*
 25 *v. Ramirez-Jimenez*, 967 F.2d 1321, 1327 (9th Cir. 1992).

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1 **III. Discussion**

2 *A. Intrinsic evidence*

3 The government contends that defendant's tax fraud was inextricably intertwined with
 4 the alleged conspiracy. (Doc. # 335). Namely, the government claims that the money defendant
 5 obtained through tax fraud was used to fund the conspiracy at issue. (Doc. # 335).

6 The Ninth Circuit has classified evidence as intrinsic in similar cases. *See United States*
 7 *v. Ripinsky*, 109 F.3d 1436, 1442 (9th Cir. 1997) (upholding admission of evidence of diverted
 8 funds as related to fraud claims in ongoing conspiracy) (reversed on other grounds); *United*
 9 *States v. Freeman*, 6 F.3d 586, 599-600 (9th Cir. 1993) (affirming admission of evidence of
 10 money paid to defendant charged with money laundering and extortion).

11 Here, defendant's tax fraud is similarly intertwined with the instant charges. Defendant's
 12 false statements to the IRS are related to the conspiracy because he used the resulting money to
 13 fund the criminal activity charged. Further, the tax fraud allowed defendant to cover up the
 14 alleged misconduct. As such, it was essential to the conspiracy. Consequently, the court finds
 15 that this evidence is inextricably intertwined with the crimes at issue.

16 *B. Other acts evidence*

17 As stated, evidence of defendant's tax fraud should be admitted as intrinsic evidence.
 18 Nevertheless, pursuant to the legal standard above, the court also finds that this evidence would
 19 meet rule 404(b)'s test of admissibility to prove knowledge.

20 First, evidence of deliberate false statements to the IRS is material to the pending charges
 21 against defendant. Defendant is charged with conspiracy, mail fraud, and wire fraud, all of
 22 which require knowledge. 18 U.S.C. §§ 1341, 1343, 1349; *see also United States v. Ward*, 747
 23 F.3d 1184, 1190 (9th Cir. 2014). More specifically, evidence of fraudulent tax returns has been
 24 admitted to show knowledge of illegal activity. *See United States v. Fuchs*, 218 F.3d 957, 965
 25 (9th Cir. 2000).

26 Second, the proposed evidence meets the 404(b) test for remoteness. According to the
 27 government, defendant filed his fraudulent tax returns within days of the alleged illegal conduct.
 28 This proximity is far from remote and tends to show the relatedness of the conduct.

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2 Third, the evidence is sufficient to support a finding that defendant committed the other
3 act. The government contends that defendant's personal disclosure form indicates around a mere
4 \$4,000. This is clearly less than the millions of dollars defendant is charged with obtaining
5 through the fraudulent HOA scheme. As such, the evidence is sufficient to show defendant's
6 fraudulent filing with the IRS.

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Finally, while the evidence here is sufficiently similar to the instant criminal allegations, this prong is not required where the other act is introduced to show knowledge. *United States v. Ramirez-Jimenez*, 967 F.2d 1321, 1327 (9th Cir. 1992). As long as the evidence is relevant to show knowledge under rule 401, it is admissible. *Id.* This standard is met here, as defendant's fraudulent tax disclosures tend to show that he knew that the HOA scheme was unlawful.

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Further, defendant has not argued that the other acts evidence at issue is unfairly prejudicial under rule 403. The evidence is highly probative of defendant's knowledge regarding the alleged unlawful conduct. While this evidence may disadvantage defendant at trial, its probative nature is not substantially outweighed by the danger of unfair prejudice.

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16 Therefore, pursuant to the legal standard above, the court finds that evidence of
17 defendant's tax fraud would be admissible to prove knowledge under rule 404(b). Nevertheless,
18 this evidence is properly admitted as intrinsic evidence outside the scope of rule 404(b).

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IV. Conclusion

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Accordingly,

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IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the government's motion *in limine*, (doc. # 335), be, and the same hereby is, GRANTED.

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DATED September 26, 2014.

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Xenia C. Mahan
UNITED STATES DISTRICT JUDGE